Supreme Court, U.S.
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No. 00-446

IN THE

Supreme Court of the United States

SANDRA L. RICE,

Petitioner,

v.

SUNRISE EXPRESS, INCORPORATED,
SUNRISE U.S.A., INCORPORATED,
and GAINEY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In a suit for alleged denial of substantive rights under the FMLA, does the plaintiff have the burden of proving by a preponderance of the evidence that she meets all the conditions necessary to the establishment of her right?

PARTIES TO THE PROCEEDINGS

Sunrise Express, Incorporated, Sunrise U.S.A., Incorporated, and Gainey Corporation, Respondents are affiliated corporations. Gainey Corporation is the former parent to Sunrise Express, Incorporated, which was merged into Sunrise USA, Inc., and is the current parent to Sunrise USA, Inc. There is no publicly held corporation that holds more than ten percent of the corporation's stock.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Family and Medical Leave Act § 107(a)(1)(A)(i)(III), 29 U.S.C. § 2617(a)(1)(A)(i)(III)

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected —

(A) for damages equal to —

(i) the amount of —

* * *

(III) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii) except that if an employer who has violated section 2615 of this title proves to the satisfaction the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively;

* * *

STATEMENT OF THE CASE

Following the elimination of her job and subsequent layoff due to economic reasons, Plaintiff filed this lawsuit claiming that she was terminated in violation of the Family and Medical Leave Act ("FMLA"). Although the jury found in Plaintiff's favor, the Court of Appeals reversed on the grounds that the trial court erroneously instructed the jury on the burden of persuasion issue. Plaintiff is now asking the Supreme Court to review the Court of Appeals decision. For the reasons stated herein, Supreme Court review is not appropriate at this time.

A. The Parties

Sunrise Express is a trucking company, located in Fort Wayne, Indiana. From its inception in 1982, until approximately 1995, the company was owned and operated by Dale and Betty Kaiser. 1 TR 258; App. 73. In late 1995, the Kaisers sold the company to the Gainey Corporation. 1 TR 199, 259; App. 67, 74.[1] In 1997, Sunrise Express was merged into Sunrise U.S.A., Inc. In 1994 Sunrise Express hired Plaintiff as one of several payroll billing clerks. 1 TR 62; App. 42.

B. Events leading to the lawsuit

Due to a variety of circumstances, including the sale of the company, the upgrading of office technology, the restructuring of job duties, and a decrease in freight, Sunrise

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1. References to "1 TR" and "2 TR" designate the Trial Record for October 22, 1998, and October 23, 1998, respectively. References to "App. __" designate location in Court of Appeals Appendix.

decided in the fall of 1995 to eliminate one of the payroll billing clerk positions. 1 TR 277, 328; App 84, 99. For purposes of determining which of the clerks should be laid off, the company considered work habits and work performance. The company selected Plaintiff because she was judged to be less qualified and did not have the same level of efficiency and good work habits as did the other clerks. 1 TR 207, 270, 285, 326; App 68, 80, 86, 97; 1 TR 326; App 97.

Although the company had decided in late 1995 that Plaintiff would be terminated, 1 TR 262, 328; App. 77, 99, the company delayed the effective date until January 1, 1996 so as to avoid termination during the holiday season. 1 TR 341; App 101. As January 1 approached, Plaintiff communicated that she was having family difficulties and as a result the company further delayed her separation. In mid-January 1996, Plaintiff injured her foot, which lead to a series of hospitalizations and leaves of absence. 1 TR 99; App 52. Because Plaintiff was receiving disability benefits while she was off on medical leave, the company decided to further delay her separation until after Plaintiff had recovered. 1 TR 16, 272, 273, 330; App 61, 82, 83, 100. When Plaintiff eventually recovered and was no longer eligible for any disability benefits, the company informed Plaintiff that she was being laid off, due to the lack of work and reorganization at Sunrise Express. 1 TR 165; App 65.

During Plaintiff's leave, Sunrise Express did not hire a replacement but, instead, 1 TR 273; App. 83, assigned her payroll billing clerk responsibilities to one of the other clerks, as the company previously had intended to do. 1 TR 273; App 83. Following her layoff, Plaintiff collected unemployment benefits for 26 weeks, 1 TR 166; App 66, and then took a position with Lutheran Homes, a nursing facility. 1 TR 54, 166; App 40, 66.

C. The Lawsuit

In November 1996, Plaintiff filed this lawsuit against Sunrise Express, claiming that Sunrise Express had violated the FMLA by failing to restore her to her payroll billing clerk position following her leave. (Complaint; App 2.) Initially, Plaintiff alleged that she was terminated in violation of § 2615, which prohibits discrimination based on the exercise of rights under the Act, and § 2614(a), which requires an employee to be restored to his or her prior position following an FMLA leave. By the end of trial, Plaintiff's only surviving claim was that Defendants failed to restore her to her former position, as required by FMLA § 2614(a). 2 TR 145-146; App 117, 118.

During the course of litigation, Plaintiff added Sunrise U.S.A., Inc., and Gainey Corporation as Defendants. In October of 1997, the case was tried to a jury by a Magistrate Judge. Although the evidence was overwhelming in establishing that Plaintiff's job had been selected for elimination well before she took her leave of absence for reasons having nothing to do with her leave of absence, the jury found in favor of Plaintiff.

In its charge to the jury the Court instructed that Sunrise had the burden of proving that Plaintiff would not have been terminated, but for her leave of absence. Sunrise objected on the grounds that Plaintiff should have the burden of persuasion.

D. Appellate Proceedings

On appeal to the Seventh Circuit, Sunrise challenged the sufficiency of evidence and the jury instructions, but the Court addressed only the jury instructions. In addition the Court raised the issue of appellate jurisdiction, but eventually concluded that jurisdiction was appropriate.

With respect to the burden of proof issue, the court found that the trial court's instructions were erroneous because the Plaintiff should have had the burden of showing that she would not have been selected for layoff had she not taken FMLA leave. In so holding, the court reasoned that the right to FMLA leave, as set forth in § 2614(a)(1) is limited by § 2614(a)(3), which states that nothing in this section shall be construed to entitle any restored employee to "any right, benefit or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave." Given that the employee has the burden of establishing "that he is entitled to the benefit that he claims," the court reasoned that plaintiff has the burden of proving that the limitation on the right does not apply:

> If the employer wishes to claim that the benefit would not have been available even if the employee had not taken a leave, the employer must submit evidence to support that assertion. When that burden of going forward has been met, however, the employee must ultimately convince the trier of fact, by a preponderance of the evidence, that, despite the alternate characterization offered by the employer, the benefit is one that falls within the ambit of

> § 2614(a)(1); the benefit is one that the employee would have received if leave had not been taken.

209 F.3d at 1018. Plaintiff is now seeking review of Court of Appeals determination.

REASONS FOR DENYING THE WRIT

Because the Supreme Court does not function as a "final source of appellate jurisdiction" and has limited capacity to hear the many cases that are brought before it, the Court will grant certiorari "only for compelling reasons." 16B C WRIGHT, A MILLER & E COOPER, FEDERAL PRACTICE AND PROCEDURE [hereinafter WRIGHT & MILLER"] §-4001 at 4 (1996); Sup. Ct. R. 10. In determining whether a particular case should be reviewed, the Court takes into consideration the "general public importance of the issues and the need to secure uniformity of federal law." 16B, WRIGHT & MILLER § 4004.1 at 27. In addition, the Court will consider the "timing" of the petition in terms of whether the Court would benefit from further "consideration" of the issue by "several lower courts, or until culminating events provide a better perspective for decision." *Id.* at 29. On appeal from a Court of Appeals decision, the Supreme Court will generally deny review unless the petitioner shows that: (1) the Court of Appeals decision is "in conflict with the decision of another United States Court of Appeals on the same important matter"; (2) the Court of Appeals has decided "an important federal question in a way that conflicts with the decision of a state court of last resort"; or (3) the Court of Appeals "has so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

In the present case, the issue is a straightforward burden of persuasion issue, which has been resolved by the Court of Appeals in accordance with general rules of statutory construction and existing legal precedents. Although the issue is one of first impression, it does not rise to the level of an exceptional issue requiring review by this Court. To the extent there is any conflict between the Court of Appeals decision in this case and the decisions in other cases, the case law has not fully developed and, therefore, the issue is not ripe for Supreme Court review.

I.

THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE GENERAL RULES OF STATUTORY CONSTRUCTION

Under general rules of statutory construction, "the limitations placed upon liability *created* by statute become part of the right conferred and to warrant a recovery under a statute that *creates* a liability, or gives a remedy, *which did not exist before*, the case must be brought within the terms of the statute." 73 AM JUR 2D, *Statutes* § 435 at 532 (1974) (emphasis added). Thus, the "*provisos* and *exceptions* in statutes creating a cause of action create a *limitation* on the right to sue and are to be regarded as *conditions precedent*," as opposed to affirmative defenses. *Id* (emphasis added); *State Use of Dunningham v. Cobourn*, 187 A. 881, 882 (Md. 1936).

Under the FMLA there is a right to medical leave and a right to restoration following such leave, but those rights did not exist at common law. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) and *Diaz*

v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997) (FMLA "creates" new substantive rights); FMLA § 101(a)(4), 29 U.S.C.A. § 2601(a)(4) (FMLA enacted because there was "inadequate job security for employees" under existing law). Accordingly, to bring a claim "within the statute," the employee must show that he or she does not fall within any of the "provisos" or "exceptions" which would operate as "limitations" on the right to sue. One of the FMLA's express "limitations" on the right to restoration is that the employee is not entitled to any position to which he or she would not have been entitled had the employee "not taken leave." *See* FMLA § 2614(a)(3)(B), 29 U.S.C.A. § 2614(a)(3)(B). Therefore, to bring a claim within the statute the employee must show as a "condition precedent" that the job is one to which he or she would have been restored, if she had "not taken the leave". If the employer disputes whether the employee would have been restored had he or she not taken the leave, the rules of statutory construction would dictate that the employee must have the burden of persuading the jury that his/her position is correct.

Consistent with the foregoing, the Court of Appeals construed the proviso in § 2614(a)(3)(B) as being a limitation or an exclusion from the substantive right, 209 F.3d at 1018, and thus, part of the Plaintiff's burden of persuasion. Given that the court's decision is consistent with the general rules of statutory construction, there is no need for Supreme Court review.

Further, to the extent there is any remaining apparent ambiguity as to the burden of persuasion under § 2614(a)(1)(B), other general principles of statutory construction resolve such apparent ambiguity. Where a

particular statutory provision is ambiguous, the provision should be construed with reference to other parts of the statute dealing with the same subject matter. *See Barmes v. United States,* 199 F.3d 386, 389 (7th Cir. 1999). The use of different language in separate clauses of a statute indicates that Congress intended distinct meanings. *Id.* (finding that Congress' use of the word "solely" in one provision of a statute while not using it in the statutory provision at issue in the case indicated that Congress did not intend the contested statutory provision to apply "solely" to the situations the plaintiff suggested.)

In the present case, in addition to § 2614(a)(3), FMLA § 2617, which deals with enforcement and "liability", also addresses the issue of burden of proof allocations. In contrast to § 2614(a)(3)(B), which does not say anything about the employer having the burden of proof, § 2617 specifically states that an employer who violates the Act is liable for liquidated damages, unless "the employer . . . *proves*" in good faith. FMLA 107(a)(1)(A)(i)(III), 29 U.S.C.A. § 2617(a)(1)(A)(i)(III) (emphasis added).

Congress's use of explicit language allocating the burden to the employer in § 2617, in contrast with its omission of any such language from section § 2614(a)(3)(B), reveals that Congress intended that different burden-allocations would apply to these two provisions. If Congress had intended for the employer to have the burden of persuasion of under section § 2614(a)(3)(B), it would have clearly worded the provision as such, with language similar to that used in 2617. The fact that Congress did not so word section § 2614(a)(3)(B) reveals that Congress intended for the burden of persuasion under this provision to remain with the

employee. For this reason also, the Court of Appeals decision is consistent with general rules of statutory construction and does not warrant Supreme Court review.

II.

THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE DECISIONS IN OTHER CASES

Prior to its decision in the present case, the Seventh Circuit had already addressed both the sufficiency of evidence needed to establish a violation of the FMLA and the burden of persuasion. With respect to the sufficiency of evidence the Court recognized that the FMLA actually creates two distinct causes of action, one of which is a "proscriptive" claim that must be analyzed according to the *McDonnell Douglas* method, *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999), and the other of which is a "substantive" claim that must be analyzed outside the *McDonnell Douglas* framework, *Diaz,* 131 F.3d at 713. As to the burden of persuasion, however, the court did not draw any distinction between substantive rights and proscriptive rights. Instead, the court held that regardless of whether the Plaintiff is suing for violation of proscriptive rights or substantive rights, the Plaintiff has burden of persuasion. *King*, 166 F.3d at 893 (plaintiff bears the burden of persuasion to demonstrate that the employer's stated reasons were false and that discrimination was the real reason behind the adverse employment decision"); *Diaz*, 131 F.3d at 713 (plaintiff has burden of establishing "by a preponderance of the evidence, that he is entitled to the benefit he claims").

In other cases, other Courts of Appeals have addressed the substantive/proscriptive dichotomy and have likewise concluded that *McDonnell Douglas* would not apply when the claim is for violation of substantive rights. *See, e.g., O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352-1354 (11th Cir. 2000) (analyzing plaintiff's failure to reinstate claim without reference to *McDonnell Douglas*). However, that does not mean that the Defendant would have the burden of persuasion in a "substantive" rights case. It simply means that for purposes of determining the *sufficiency of the evidence*, *McDonnell Douglas* does not apply.

In the present case the Plaintiff was suing for violation of substantive rights, but the issue addressed on appeal was the burden of persuasion and not the sufficiency of evidence issue. By holding that the Plaintiff had the burden of persuasion the Court did not deviate from any prior precedents, but merely applied the same rule that had been applied in previous cases.[2]

2. In *Diaz v. Fort Wayne Foundry Corp*, the plaintiff was suing because she had been denied FMLA leave. In response, the employer asserted that the plaintiff had failed to "cooperate with the second-opinion process under § 2613(c)" of the Act. 131 F.3d at 713. Because the plaintiff was suing to enforce a substantive right, the court held that *McDonnell-Douglas* did not apply, but the plaintiff still had burden of establishing "by a preponderance of the evidence, that he is entitled to the benefit he claims. 131 F.3d at 713. Based on the record presented, the Seventh Circuit agreed that plaintiff had not complied with the second-opinion process and, therefore, had not established his entitlement to leave.

In the present case, the plaintiff sued because she was not restored to her position following her FMLA leave. In response, the Company relied on the limitation in § 2614(a)(3)(B), asserting that Plaintiff's job had been eliminated. By requiring Plaintiff to prove that the limitation did not apply in this case, the Court of Appeals was merely applying the same rule of law that had already been established in the *Diaz* case.

III.

THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE ELEVENTH CIRCUIT'S DECISIONS IN O'*CONNOR AND PARRIS*

In support of her Petition, Plaintiff relies on the Eleventh Circuit decisions in *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349 (11th Cir. 2000) and *Parris v. The Miami Herald Publishing Co.*, 216 F.3d 1298 (11th Cir. 2000). However, those decisions do not address the burden of proof issue.

In *O'Connor*, the plaintiff sued because the defendant-company had terminated plaintiff's employment while she was on FMLA leave of absence. In response, the company argued that plaintiff was terminated due to a reduction-in-force, which would have occurred regardless of whether plaintiff had taken FMLA leave. After hearing the evidence in a bench trial, the district court found no violation of the Act. On appeal, plaintiff argued that her right of reinstatement was "absolute" and, therefore, she proved her claim simply by establishing that she was terminated while on FMLA leave. The Eleventh Circuit disagreed with plaintiff's position, reasoning that "an employer can deny the right to reinstatement in certain circumstances." 200 F.3d at 1354. Although the court went on to state that the employer "would have an opportunity to *demonstrate* that it would have discharged the employee even if she had not been on FMLA leave," the court was not responding to any argument regarding the burden of persuasion, nor did the court state whether it was using the term "demonstrate" to mean "burden of production" or "burden of persuasion." *Compare, e.g., Dissert v. United States Sec'y of Labor*, 105 F.3d 607, 609-

610 (11th Cir. 1997) (equating the term "demonstrate" with "burden of persuasion"), *with Miranda v. Wisconsin Power and Light Co.*, 91 F.3d 1011, 1015 (7th Cir. 1996) (equating the term "demonstrate" with "burden of production"). *See generally, Dissert v. United States Sec'y of Labor*, 105 F.3d at 609 (term "demonstrate" is inherently "ambiguous"). Rather than addressing the burden of persuasion issue, the court was merely responding to plaintiff's argument that her right of reinstatement was "absolute."

In *Parris*, the facts were similar to the facts in *O'Connor* in that the plaintiff was complaining of his termination while on leave of absence, in response to which the employer was asserting that the plaintiff had been terminated as part of a reduction-in-force. Based on the discovery record, the district court found that the plaintiff's termination was "fully documented and scheduled" for the date in question and, therefore, the employer was entitled to summary judgment. On appeal, the Eleventh Circuit found that the evidence was conflicting as to whether plaintiff had been scheduled for termination on the date in question and whether defendant would have terminated plaintiff on the date in question had he not been on FMLA leave. 216 F.3d at 1302-1303. The court therefore remanded for further proceedings. In anticipation of the case proceeding to trial, the court said, in a footnote, that the employer would bear "the burden of proving that the employee would have been laid off during the FMLA period for reasons unrelated to the employee's condition." *Id*, at 1301, note 1. However, there is no indication that the burden of proof issue was ever raised or argued by the parties; nor is it clear whether the court was using the term "burden of proving" to mean burden of persuasion or burden of going forward. *See* BLACK'S LAW DICTIONARY 178 (5th ed. 1979) (term "burden of proof" has

been used "to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a *prima facie* showing, that is, the burden of going forward"). In support of its statement regarding the employer's burden, the court cited its prior decision in *O'Connor*. As demonstrated above, however, *O'Connor* does not squarely address the burden of proof issue, nor does *O'Connor* even use the term "burden of proving."

In the present case, the Court of Appeals specifically addressed the *O'Connor* decision, concluding that the Eleventh Circuit had not "in any definitive fashion" stated that the "statutory text was intended to alter the normal allocations of proof at trial." 209 F.3d at 1018. For the reasons stated above, the Court's assessment of *O'Connor* (and by the same analysis its assessment of *Parris*) is plainly correct.

To the extent that the Court of Appeals' statements in *O'Connor* and *Parris* can be construed as being inconsistent with the Court's holding in the present case, such statements are nonetheless ambiguous and, at most, are dicta, which is different than inconsistency. At the very least, this Court should allow further development of the case law so that the issue can be properly debated and the inconsistency of opinion, if any, can be better defined.

IV.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DOL REGULATIONS

With respect to the Department of Labor ("DOL") regulations (*see* Plaintiff's Petition at 2-3), there are two problems with Plaintiff's argument.

First, there is no direct conflict between the Court of Appeals decision and the DOL regulations, unless one assumes that the DOL is using the term "burden of proving" to mean "burden of persuasion," as opposed to "burden of production." *See* BLACK'S LAW DICTIONARY 178 (5th ed. 1979) (the term "burden of proof" has been used "to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a *prima* facie showing, that is, the burden of going forward"). As noted by the Court of Appeals here, 209 F.3d at 1018, it is unclear and should not be assumed that the DOL was intending in its regulations to define the burden of persuasion as opposed to the burden of going forward. *See also Kosakow v. New Rochelle Radiology Associates*, 88 F. Supp. 2d 199, 213 (S.D.N.Y. 2000) ("No court has yet addressed the issue of whether this regulation actually shifts the burden of proof in a civil action from the plaintiff to the defendant").

Second, there is no conflict between the Court of Appeals decision and the DOL regulations in that the DOL regulations are for purposes of establishing administrative rules as opposed to rules for civil actions. In other words, even the DOL may place the burden of persuasion on the employer for purposes of deciding an administrative charge filed pursuant to 29 C.F.R. §§ 825.400-825.404 (1997), that does

not mean that the same burden of persuasion would apply in a civil action filed in federal or state court pursuant to 29 U.S.C.A. § 2617(a)(2). *See also Kosakow*, 88 F. Supp. at 213 ("No court has yet addressed the issue of whether this regulation actually shifts the burden of proof in a civil action from the plaintiff to the defendant).

V.

TO THE EXTENT THERE IS ANY INCONSISTENCY WITH THE DOL REGULATIONS, THAT WOULD NOT BE GROUNDS FOR REVIEW BY CERTIORARI

To the extent that the Court of Appeals decision in this case is at odds with the DOL regulations, that does not create any inconsistency "with the decision of another United States Court of Appeals" and, therefore, does not state any ground for review by certiorari under S. Ct. R. 10. Moreover, it is not uncommon for this Court or any other court to reject an agency's interpretation of the statute. *See, e.g., Pittson Coal Group v. Sebben,* 488 U.S. 113, 121 (1988) (refusing to enforce Department of Labor regulations found inconsistent with § 902 of the Black Lung Benefits Reform Act) *Smith v. Metropolitan School District*, 128 F.3d 1014, 1038 (7th Cir. 1997); *Cox v. Auto Zone, Inc.*, 990 F. Supp. 1369, 1375 (M.D. Ala. 1998) (refusing to enforce FMLA regulations that conflict with statutory language). Thus, even if the Court of Appeals decision is found to be in conflict with DOL regulations, that does not mean that the issue is of such importance as to require review by this Court.

VI.

THE DECISION IN THIS CASE WILL HAVE LITTLE PRACTICAL IMPACT ON EMPLOYERS OR EMPLOYEES

At page 15 of its Petition, Plaintiff argues that the Court of Appeals decision in this case "will discourage employees from taking leave." That argument assumes that employees read Court of Appeals decisions prior to taking leave of absence, and shape their behavior depending on their assessment of how a judge will ultimately instruct the jury on a burden of persuasion question in the event the employee sues and the case goes to trial. Those assumptions are fanciful.

VII.

THE COURT OF APPEALS DECISION DOES NOT UNDERMINE THE FRAMEWORK OR PURPOSE OF THE FMLA

Plaintiff's final argument is that the panel's decision undermines the framework and purposes of the FMLA. (*See* Plaintiff's Petition at 13-14.) That argument is circular, in that it assumes that the Court of Appeals decision is wrong. To meet the very high standard for obtaining review by certiorari, the plaintiff must show that the decision actually conflicts with the decision of another United States Court of Appeals or is of such exceptional importance as to warrant Supreme Court review. S. Ct. R. 10. Arguing that the decision is wrong does not meet the test for obtaining review by certiorari.

Moreover, the right of restoration, as set forth in 29 U.S.C. § 2614(a)(1), was never intended to be "absolute." *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-1354 (11th Cir. 2000). Instead the right has always been intended to be limited. By requiring the employee to prove that she does not fall within the limitation, the panel has not altered any part of the statute, but has merely given effect to the statute as a whole.

As to whether the employer has "control" of the evidence needed to decide the issue (*see* Plaintiff's Petition at 14), the situation is no different than the situation in any Title VII case. Given that the employee has the burden of persuasion in a Title VII case, there is no logical reason why the employer should have that burden under the FMLA.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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